SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 60.

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

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Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, petitioner in the above-captioned cause, requests the Court to broaden the scope of review previously granted in its order of December 5, 1955, to include Question Number 3, involving the taxability of misappropriated funds. For his grounds, petitioner calls to the Court's attention the decision of the

United States Court of Appeals for the Sixth Circuit in **Davis v. United States**, Par. 73007 P-H Fed., 1955, decided on October 13, 1955, subsequent to the filing of petitioner's Supplemental Brief herein. This case once again demonstrates the importance to the administration of the revenue laws of the need for some definitive principles clarifying the proper application of the **Wilcox** and **Rutkin** cases. In this case the Sixth Circuit, without so much as the citation of the **Wilcox** case and relying on the **Rutkin** case, distinguishes the **Wilcox** rationale on the bases that the funds, as in the instant case, were obtained by fraud and the alleged embezzlement was by a stockholder from his wholly-owned corporation. In doing so, it cited the Third Circuit case of **Kann v. Commissioner**, 210 F. 2d 417, which is contrary to a later decision of the Second Circuit in **Estate of Jacob J. Dix v. Commissioner of Internal Revenue**, 223 F. 2d 436, certiorari denied No. 363, this Term. Therefore, while not contrary to the instant case, the intervening decision of the Sixth Circuit in the **Davis** case, it is submitted, re-emphasizes the need for review previously expressed by petitioner and by the Solicitor General in his petition for certiorari in the **Dix** case, No. 363, this Term. Whatever this Court's ultimate treatment, such clarification or, perhaps, enlightenment of taxpayers and the Commissioner, if that be the more accurate expression, is being earnestly requested by all parties concerned with the proper administration of old Section 22 (a) of the Revenue Code of 1939 and its successor Section 61 (a) of the Revenue Code of 1954. The meaning and import of the **Rutkin** case (as applied in the **Davis** case), petitioner is advised, will be raised by counsel for Davis in a petition for certiorari to be filed in this Court on or before December 10, 1955. Such a petition for certiorari will provide this Court with full range and opportunity to lay down controlling principles involving the includibility of misappropriated funds in three dissimilar, but closely related factual situations:

(1) where the employee misappropriating the funds is not a stockholder of the employer corporation and the availability of corporate surplus for the distribution of dividends could not affect taxability, **Berra v. United States**, No. 60, this Term;

(2) where the employee misappropriating the funds of the employer corporation is the equitable owner of a substantial stock interest in the employer corporation and the available corporate surplus for dividends could affect taxability, **Estate of Dix v. Commissioner of Internal Revenue**, No. 363, this Term;

(3) where the employee misappropriating the funds of the employer corporation is the sole owner of the stock in the employer corporation and the available corporate surplus for dividends could affect taxability, **Davis v. United States**, No. ...., this Term (to be filed on or before December 10, 1955).

For the foregoing reasons, petitioner requests the Court to withhold its consideration of this petition for rehearing until it has fully considered the petition for certiorari to be filed in **Davis v. United States**, supra, so that the Court may, if it deems proper, broaden the scope of review to include Question Number 3 as requested herein, vacate its earlier order denying certiorari and grant same in the **Dix** case, No. 363, this Term, and grant certiorari to petitioner Davis on the instant question.

Respectfully submitted,

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islature has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more—in other words, a greater offense including a lesser." *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C. A. 1). The basic principle to be extracted from the countless cases on the subject, which are mainly in the state courts, is that a "lesser included offense" instruction is required where there exists a gradation of offenses, in which the greater offense alleged contains the same elements plus some aggravating ingredient not found in the lesser included offense, and where the evidence permits the jury to find the defendant not guilty of the greater offense but guilty of the lesser. See 1 Wharton, *Criminal Law* (12th ed., 1932), Section 33. The rule was applied as a matter of common law by this Court in 1857, *Dynes* v. *Hoover*, 20 How. 65, 79–80, and in 1872 Congress gave the rule statutory sanction:

> "That in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged; *Provided*, That such attempt be itself a separate offense."

Act of June 1, 1872, Sec. 9, c. 255, 17 Stat. 196. This provision was incorporated into the Revised Statutes of 1874 as Section 1035, and appeared in the 1934, 1940 and 1946 edi-

In the 1890's this Court decided four cases applying the "included offense" doctrine. These cases lay down three basic principles which are applicable here:

(1) The only object of the rule is to enable the jury, if it does not find defendant guilty of the crime charged and if the evidence permits it to do so, to find him guilty of a lesser offense necessarily included in the one charged. *Sparf and Hansen* v. *United States*, 156 U. S. 51, 63.

(2) Since it is for the jury to decide what the evidence proves, a requested instruction as to a lesser included offense or offenses must be given if there is any reasonable view of the evidence under which the jury might properly conclude that the defendant committed only a lesser degree of the crime charged. *Stevenson* v. *United States*, 162 U. S. 313, 314–316, 321–323.

(3) If there is no evidence showing that a lesser crime was committed by the defendant, the instruction should not be given for it would result only in confusing the jury. *Davis* v. *United States*, 165 U. S. 373, 378–379; *Andersen* v. *United States*, 170 U. S. 481, 510–511.

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tions of the United States Code as 18 U. S. C., Section 565, the only change in language being the substitution of the word "if" for the words "Provided, that." The provisions now exist in substantially similar form as Rule 31 (c) of the Federal Rules of Criminal Procedure. (*Supra*, p. 4.) The notes of the Advisory Committee state that Rule 31 (c) "is a restatement of existing law."

The following are a few familiar illustrations of application of the "included offense" doctrine. A defendant charged with murder may be convicted of manslaughter if the jury finds an absence of malice (*Stevenson* v. *United States,* 162 U. S. 313, 315–316, 321–323). A defendant charged with robbery may be found guilty of larceny, for robbery is aggravated larceny (*Lamore* v. *United States,* 136 F. 2d 766 (C. A. D. C.)). An indictment for burglary supports a conviction for larceny where the jury is not satisfied as to the breaking and entering in the nighttime (*United States* v. *Dixon,* 25 Fed. Cas. No. 14,968 (C. C. D. C.)). A defendant indicted for adultery may be convicted of fornication where the evidence showed that he was unmarried (*Respublica* v. *Roberts,* 2 Dall. 124 (Pa.)). A defendant charged with assault and battery with intent to kill may be convicted of an assault and battery only, "if the jury are satisfied that he was not guilty of the felonious intention" (*Ex parte Robinson,* 10 D. C. 418, 419).

Clearly Rule 31 (c) has no application here. This is not a case where the indictment charges a "greater" offense, *e. g.,* murder, and the proof would permit the jury to convict the defendant of a "lesser" offense, e. g., manslaughter, which contains some but not all of the elements of the offense charged. Whether an offense is "necessarily included" in another depends on a comparison of the substantive elements of the two

offenses, and not on a difference in the penalties prescribed. The lesser included offense must be, in substance, a "lower grade" of the offense charged. *Stevenson* v. *United States*, 162 U. S. 313, 315.

One offense is not "necessarily included" in another merely because, as in this case, the proof against the defendant would support his conviction of either offense. There is no aggravating ingredient to be found among the elements of Section 145 (b) which is not also found in Section 3616 (a). There being no element of aggravation which is present in "the offense charged" but absent in a violation of Section 3616 (a), the latter is clearly not a "lower grade" of the former. Nor can there be any reasonable view of the evidence under which the jury could properly find that petitioner did not wilfully attempt to evade or defeat the tax in the manner alleged in the indictment, i. e., by filing a false and fraudulent return (Section 145 (b)), but that he did file a false or fraudulent return "with intent to defeat or evade the * * * assessment" (Section 3616 (a)).[8]

[8] Obviously, the word "assessment" as used in Section 3616 (a) is equivalent to the word "tax." *United States* v. *Gold*, 53 F. Supp. 848 (D. N. J.). See Section 3612 (f) of the 1939 Code (53 Stat. 438), which provides that "The Commissioner shall determine and assess all taxes, other than stamp taxes," in cases where a taxpayer fails to file a return or files a false or fraudulent return. In such cases the Commissioner in effect files a substitute return (Sec. 3612 (a), (b)).

Petitioner concedes (Br. 11) that "anyone who delivers or discloses a false or fraudulent return 'with intent to defeat or evade the * * * assessment' is attempting to defeat and evade his taxes." He argues, however (Br. 19–20), that the aggravating ingredient present in the felony and lacking in the misdemeanor may be a greater "quantum of gravity," and that "[w]hether an offender is 'major' or 'minor' is a proper jury question * * *."

But we can think of no instruction that would guide a jury in distinguishing between the "quantum of gravity" required to make out one offense and not the other, and certainly petitioner's requested instruction made no attempt to do so. Nor do the statutes lay down any dividing line between the two offenses with respect to the degree of wilfullness required. Petitioner's suggestion merely emphasizes the complete absence of any rational basis upon which the jury could find as a fact that he did not violate Section 145 (b) but did violate Section 3616 (a).

Thus, an independent ground justifying the trial court's refusal to give the requested instruction is that it was patently inadequate. The one proposed by petitioner was incomplete and erroneous in that it did not purport to advise the jury (1) under what state of the evidence it should consider whether petitioner had violated

Section 3616 (a); and (2) what standards should be used in distinguishing between the two offenses, *i. e.*, what aggravating element or elements are required for the felony but not the misdemeanor. It is well settled that, where a "lesser included offense" instruction is given, the jury is directed to determine first whether the defendant is guilty of the offense charged in the indictment, and if it finds that he is not, or if it has a reasonable doubt as to whether the aggravating ingredient has been proved, then and only then should it inquire into whether he is guilty of the lesser offense. *McAffee* v. *United States*, 105 F. 2d 21, 31 (C. A. D. C.); *Goodall* v. *United States*, 180 F. 2d 397, 400 (C. A. D. C.); *Marcus* v. *United States*, 86 F. 2d 854, 859 (C. A. D. C.); *Sekinoff* v. *United States*, 283 Fed. 38, 40 (C. A. 9); *Ex parte Robinson*, 10 D. C. 418, 419; *United States* v. *Meagher*, 37 Fed. 875, 880 (C. C. W. D. Texas). Cf. *Ekberg* v. *United States*, 167 F. 2d 380 (C. A. 1).[6] This is also the rule generally followed throughout the state courts.[7]

In the present case, there was no such issue of fact which could properly be left to the jury.

[6] In the *Elkberg* case the greater and the lesser included offenses were set out as separate counts of the indictment. The court held (167 F. 2d, pp. 385–386) that the conviction on a general plea of guilty could stand but that the punishment could not exceed that provided for the greater offense.

[7] *Dillon* v. *State*, 137 Wis. 655, 667–668; *Commonwealth* v. *Chavis*, 357 Pa. 158; *State* v. *Mele*, 140 Conn. 398; *Thoreson* v. *State*, 69 Okl. Cr. 128; *State* v. *Louther*, 22 Wash. 2d

Upon what basis of *fact* could it possibly choose as between a violation of Section 145 (b) or of Section 3616 (a)? If the acts alleged in the indictment had been proved, petitioner was guilty under both statutes. If they had not been proved, he was not guilty under either. Under the indictment in this case (which is typical of almost every Section 145 (b) prosecution), charging evasion of income tax by filing a false return, there was no ingredient of the Section 145 (b) offense which was not also required for conviction under Section 3616 (a).[8]

3. PETITIONER'S ARGUMENT, IF ACCEPTED, WOULD IN EFFECT REPEAL SECTION 145 (b) AS APPLIED TO FILING FALSE RETURNS WITH INTENT TO EVADE THE TAX

The simple and dominant fact in this case is that Sections 145 (b) and 3616 (a) overlap, and in an area within which the facts of this case fall. Section 145 (b) makes it a felony to attempt wilfully "in any manner to evade or defeat" the income tax. In the overwhelming majority of cases prosecuted under Section 145 (b),

497; *Kimball* v. *State*, 63 Ga. App. 183; *Sewell* v. *Commonwealth*, 284 Ky. 183; *State* v. *Young*, 314 Mo. 612, 630; *State* v. *Endorf*, 219 Iowa 1321; *Koehler* v. *State*, 188 Ind. 387.

[8] This would not be true, of course, in those rare cases under Section 145 (b) where the alleged manner of evasion does not take the form of filing a false return. *E. g.*, *United States* v. *Smith*, 206 F. 2d 905 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 384 U. S. 887. In such cases, of course, the proof required for conviction would differ from that in a Section 3616 (a) case.

the "manner" of attempted tax evasion alleged in the indictment is, as in this case, the filing of a false and fraudulent return understating the amount of tax due. That such a filing violates Section 145 (b) has been uniformly and repeatedly recognized by this Court (see *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 47; *Spies* v. *United States*, 317 U. S. 492, 499; *Holland* v. *United States*, 348 U. S. 121, 125, 139; *Smith* v. *United States*, 348 U. S. 147, 149, 159) and the courts of appeals. E. g., *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1); *United States* v. *Rosenblum*, 176 F. 2d 321, 329–330 (C. A. 7); *United States* v. *Croessant*, 178 F. 2d 96 (C. A. 3), certiorari denied, 339 U. S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C. A. 7); *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C. A. D. C.); *Cave* v. *United States*, 159 F. 2d 464, 466 (C. A. 8).

The filing of a false or fraudulent return with intent to evade tax is also made a misdemeanor by Section 3616 (a); and the section clearly applies to all federal tax returns, including income tax.[9] Both statutes are general in nature, and

[9] As petitioner points out (Br. 9–10), Section 3616 (a) has frequently been utilized by the Government in the prosecution of income tax cases in which the evidence of wilful evasion, though technically adequate to warrant the institution of proceedings under Section 145 (b), shows an offense of such minor importance as to justify the choice of a misdemeanor charge instead of felony. In numerous cases, for example, individual taxpayers evade very small

the scope of the misdemeanor, as has been pointed out, overlaps the scope of the felony in the area within which the facts of this case fall. Does it follow that an offense which falls within the area of overlap can be prosecuted *only* under Section 3616 (a)? That is the necessary result if petitioner's argument is accepted. Under such a view the phrase in Section 145 (b) proscribing attempted evasion "*in any manner*" would be construed as if it read "in any manner except filing a false and fraudulent return." The effect would be to delete from Section 145 (b) "the most common and also the most flagrant method of wilfully attempting to defeat or evade an income tax" (*Rick* v. *United States*, 161 F. 2d 897, 898 (C. A.

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portions of their income taxes by claiming false dependents in their returns. We agree with petitioner, contrary to the court below (see *Dillon* v. *United States*, 218 F. 2d 97, 103), that Section 3616 (a) applies to income tax violations. We think that its unqualified terms, the enactment of the predecessor of Section 3616 (a) in 1864 as part of a Revenue Act which included an income tax (Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281–285), and its collocation in the Internal Revenue Code of 1939, all point to its applicability to false income tax returns. This construction has been tacitly sustained in a number of cases. *Ex parte Cohen*, 191 F. 2d 300 (C. A. 9), certiorari denied, 342 U. S. 947; *Taylor* v. *United States*, 179 F. 2d 640, 643–644 (C. A. 9); *Kirsch* v. *United States*, 174 F. 2d 595, 597–598 (C. A. 8); *Slick* v. *United States*, 1 F. 2d 897 (C. A. 7); *Ex parte Berkoff*, 65 F. Supp. 976, 979–981 (D. Minn.); *United States* v. *Koppelman*, 61 F. Supp. 1007, 1008–1009 (M. D. Pa.); *United States* v. *Benz*, 24 Fed. Cas. No. 14,576 (N. D. Ill.) see also 10 Mertens, *Law of Federal Income Taxation*, Sec. 55.66.

D. C.))—a result which Congress plainly could not have intended. It would also require the overruling of *Beacon Brass* and countless other cases decided by this Court and the lower courts (*supra*, p. 23) holding that the filing of a false or fraudulent income tax return violates Section 145 (b).

The criminal statutes of the United States are not like a jigsaw puzzle in which all the pieces neatly interlock, with no gaps or laps. Many statutes do overlap, and it is not at all uncommon for a single act or transaction to violate more than one provision. *Pereira* v. *United States*, 347 U. S. 1, 9; *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45; *United States* v. *Gilliland*, 312 U. S. 86, 95–96; *Blockburger* v. *United States*, 284 U. S. 299, 304; *United States* v. *Noveck*, 273 U. S. 202, 206–207; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Hammer* v. *United States*, 271 U. S. 620, 625; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Wood* v. *United States*, 16 Pet. 342, 363.[10] Where there are two statutes proscribing the same conduct, "the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U. S. 188, 198. "It is a cardinal principle

[10] As another example, an attempt to bribe a juror may be punishable as a felony under 18 U. S. C. 206, as a misdemeanor under 18 U. S. C. 1504, or possibly as a criminal contempt under 18 U. S. C. 401. Cf. *Slade* v. *United States*, 85 F. 2d 786 (C. A. 10); *United States* v. *Zullo*, 151 F. 2d 560 (C. A. 3); *Hawkins* v. *United States*, 190 F. 2d 782 (C. A. 4).

of construction that repeals by implication are not favored. * * * It is not sufficient, as was said by Mr. Justice Story in *Wood* v. *United States,* 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be a 'positive repugnancy between the provisions of the new law, and those of the old * * *.'" *United States* v. *Borden Co., supra,* at 198–199.

There is certainly no "positive repugnancy" between Sections 145 (b) and 3616 (a), requiring the conclusion that one impliedly repeals the other *pro tanto,* to the extent that they overlap. And, indeed, if it should be concluded that there is such a repeal by implication, *which* is repealed? Both appear in the same statute, the Internal Revenue Code of 1939. If it be relevant to determine which was the "earlier" (cf. *Adkins* v. *Arnold,* 235 U. S. 417), it may be noted that Section 3616 (a) is derived from a provision originally enacted in 1798.[11] Section 145 (b) is a comparative newcomer, appearing for the first time in the Revenue Act of 1917.[12] Further, if it be relevant to determine which is the "gen-

[11] Act of July 9, 1798, Sec. 11, c. 70, 1 Stat. 580, 586; and see Sec. 3179 of the Revised Statutes, which was the immediate predecessor of Sec. 3616 (a).

[12] Sec. 1004, c. 63, 40 Stat. 300, making the crime a misdemeanor. It was made a felony by the Revenue Act of 1924, Sec. 1017 (b), c. 234, 43 Stat. 253.

eral" provision and which is "specific," it may be noted that Section 3616 (a) applies to *all* tax returns, while Section 145 (b) is limited to *income* tax violations. In another respect, however, Section 145 (b) is broader in that it punishes attempted evasion in *any* manner, without necessarily filing a false return. *Spies* v. *United States*, 317 U. S. 492, 500; *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887. Although the overlap covers a broad area, the offenses defined in the two provisions are not identical, and there is no reason to suppose that Congress did not intend both to exist side by side.

In *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 46, the question was "whether by enacting a statute specifically outlawing all false statements in matters under the jurisdiction of the United States [18 U. S. C. 1001], Congress intended thereby to exclude the making of false statements from the scope of § 145 (b)." The Court answered in the negative, even though the statute of limitations barred prosecution of the defendant under 18 U. S. C. 1001. "We do not believe that Congress intended to require the tax-enforcement authorities to deal differently with false statements than with other methods of tax evasion. By providing that the sanctions of § 145 (b) should be 'in addition to other penalties pro-

vided by law,' Congress recognized that some methods of attempting to evade taxes would violate other statutes as well." (*Ibid.*)

Similarly, in *United States* v. *Noveck*, 273 U. S. 202, the defendant was indicted and convicted of a felony under the general perjury statute (Section 125 of the Criminal Code of 1909) for having filed false income tax returns. He argued that that provision had been repealed *pro tanto* by the precursor of § 145 (b), Section 253 of the Revenue Act of 1918, making it a misdemeanor wilfully to attempt in any manner to defeat or evade the income tax. Rejecting this contention for a unanimous Court, Mr. Justice Brandeis stated: "The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or act. * * * The fact that perjury is a felony, while filing a false return is only a misdemeanor, presented no obstacle." (273 U. S. at 206–207.) And see *Taylor* v. *United States*, 179 F. 2d 640, 644 (C. A. 9).

To the same general effect, although it is not a tax case, is *United States* v. *Gilliland*, 312 U. S. 86. There the Court sustained convictions under Section 35 of the Criminal Code, as amended in 1934, where the defendants had submitted false and fraudulent reports to a Government agency under the so-called "Hot Oil" Act of 1935, 49 Stat. 30. It was conceded that defendants' acts

violated both Section 35, the general "false statements" felony statute, and the "Hot Oil" Act, which made such acts misdemeanors. It was argued that defendants could be punished only under the latter Act, since it was (a) more specific, dealing with the precise subject-matter involved, (b) later in time, and (c) prescribed a less severe penalty. Arguing for repeal by implication, counsel for the defendants stated (see 312 U. S. 88): "Otherwise, we have the same offense created and punished by two distinct enactments; and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail or two thousand dollars fine, or ten years in the penitentiary and ten thousand dollars fine." However, the Court held unanimously, per Hughes, C. J., that "There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934 [amending Section 35], with its provision as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 * * *. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in § 35." (312 U. S. at 95–96.)

It is clear, therefore, that the fact that this case might have been brought under Section 3616 (a) does not bar prosecution and conviction under Section 145 (b), if the indictment and proof

QUESTION PRESENTED

The Court's order granting certiorari limited review to question (2) presented by the petition for the writ, which reads as follows:

"Whether in a prosecution under a felony indictment for tax evasion under Section 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under Section 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense."

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939 (53 Stat. 1, Title 26 U. S. C., 1952 ed.):

SEC. 145. *Penalties.*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or impris-

oned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

SEC. 3616. *Penalties.*

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * *

Federal Rules of Criminal Procedure (327 U. S. 821, 838–39, 854):

Rule 7. THE INDICTMENT AND THE INFORMATION

* * * * *

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be al-

leged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 31. VERDICT

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT

On May 28, 1954, petitioner was indicted in the United States District Court for the Eastern District of Missouri on three counts of willfully attempting to evade his income taxes for the years 1951, 1952 and 1953 by filing false and fraudulent returns understating the taxes due and owing to the United States, in violation of Section 145 (b) of the Internal Revenue Code of

1939. (R. 5–7.)[1] After a jury trial petitioner was found guilty as charged. (R. 221–222.) On October 28, 1954, the district court entered judgment convicting petitioner of the "offenses of wilfuly and knowingly attempting to evade and defeat a large part of the income tax due and owing" for the years 1951, 1952 and 1953 (R. 235); and he was sentenced to four years imprisonment on each count, the terms to run concurrently (R. 235–236). The Court of Appeals affirmed his conviction on these counts (R. 258).

The evidence to support the verdict may be summarized as follows:

During the prosecution years the petitioner's reported income consisted solely of salary and expenses received from his two employers, Teamsters Union, Local 688, and the Labor Health Institute. (R. 106–107, 110, 115.) The Institute is a medical center, providing medical care and dental services to members of Local 688. (R. 51.) Petitioner was business manager of the Institute, and hired employees, authorized expenditures, and signed checks on the Institute's

[1] Petitioner was also indicted by the same grand jury on two counts of endeavoring to obstruct justice and to influence a grand jury witness by requesting him to destroy certain records and to testify falsely before the grand jury. (R. 1–5.) The two cases were consolidated for trial, and petitioner was found guilty on all counts (R. 221–222.) The Court of Appeals reversed the conviction on one of the two obstruction of justice counts, and affirmed the other. (R. 258.) No question is now before this Court as to either count.

bank account. (R. 52–55, 105, 128, 153). Late in 1950 petitioner induced one Schmidt, who was then doing painting work for the Institute, to falsify his labor costs and to pay over the padded amounts to petitioner. (R. 67–68.) Petitioner received from Schmidt $2,000 in 1951, $2,269.30 in 1952, and $900 in 1953, none of which was reported on his income tax returns. (R. 70–72, 75, 106–107, 110, 115.)

Petitioner also received unreported income in the form of materials and services through other devices which operated in fraud of the Institute. During the prosecution years Schmidt and his associates did approximately $2,500 or $3,000 of painting and other work on petitioner's home, and in 1951 petitioner had another contractor do work at his home at a cost of $1,577.38, all of which was paid for by the Institute. (R. 53–62, 72–73, 136–137.)

On each of the three tax evasion counts, the trial court refused to give the following instruction requested by petitioner (R. 214, 216–217):

> Under the law you may find the defendant guilty of a lesser crime than the crime charged in each count of the income tax indictment.
>
> The statute upon which the lesser crime is based, omitting that part of the act which does not apply in this case, reads as follows:
>
> "Whenever any person * * * delivers or discloses to a collector * * * any false

or fraudulent * * * return * * * with intent to defeat or evade the * * * assessment intended to be made, shall be guilty of a misdemeanor."

Under Count I if you find and believe from the evidence that the defendant delivered, caused to be delivered or disclosed to the Collector of Internal Revenue for the First Collection District of Missouri, a false income tax return with intent to defeat or evade the assessment intended to be made, you will find him guilty of this lesser crime.[2]

* * * * *

(Sec. 3616 (a), Title 26.)

SUMMARY OF ARGUMENT

The trial court was clearly correct in refusing to give the requested instruction. One offense is not "necessarily included" in another merely because, as here, the proof would support a conviction of either offense.

Sections 145 (b) and 3616 (a) overlap in a broad area illustrated by the present case. The filing of a false and fraudulent return understating the amount of tax due violates both sections. It is not uncommon for a single act or transaction to violate more than one federal criminal statute, and there is no reason to suppose that Congress did not intend the two statutes involved here to

[2] Two paragraphs of the requested instruction, repeating the same language as to counts 2 and 3, are omitted here.

co-exist. The fact that one proscribes a felony and the other a misdemeanor presents no obstacle. *United States* v. *Noveck*, 273 U. S. 202, 206–207; *United States* v. *Gilliland*, 312 U. S. 86, 95–96. "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law * * *" *Rosenberg* v. *United States*, 346 U. S. 273, 294 (opinion of Clark, J.); *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45.

This case presents no question as to the legality of the sentence or the validity of the indictment under Section 145 (b). This Court many years ago laid down basic principles which apply to the instant case: (1) the only object of the "included offense" rule is to enable the jury, if it does not find defendant guilty of the crime charged and if the evidence permits it to do so, to find him guilty of a lesser offense necessarily included in the one charged. *Sparf and Hansen* v. *United States*, 156 U. S. 51, 63. (2) An instruction as to a lesser included offense must be given upon proper request if there is any reasonable view of the evidence under which the jury might properly conclude that the defendant committed only a "lower grade" of the crime charged. *Stevenson* v. *United States*, 162 U. S. 313, 314–316, 321–323. (3) If there is no evidence showing that a lesser crime was committed by the defendant, the instruction can only confuse the jury and should

not be given. *Davis* v. *United States*, 165 U. S. 373, 378–379.

Applying these principles here, we think it is clear that the instruction requested by petitioner was correctly refused. Petitioner concedes that the language "with intent to defeat or evade" in Section 3616 (a) clearly indicates the necessity for proof of willfulness. There is, then, no aggravating ingredient in Section 145 (b) which is not found also in Section 3616 (a). Petitioner's suggestion that the aggravation may consist of a greater "quantum of gravity" or a higher degree of willfulness finds no justification in the statutes, nor did the requested instruction pose any such distinctions. Under no view of the evidence could the jury properly find that petitioner did not willfully attempt to evade or defeat the tax by filing a false and fraudulent return (Section 145 (b)) but that he did file a false or fraudulent return with intent to defeat or evade the assessment (Section 3616 (a)).

Thus, an additional ground justifying the trial court's refusal to give the requested instruction is that it was patently incomplete and erroneous in that it did not purport to advise the jury (1) under what state of the evidence it should consider whether petitioner had violated Section 3616 (a); and (2) what standards should be used in distinguishing between the two offenses.

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY, AS REQUESTED BY PETITIONER, TO FIND HIM GUILTY OF A VIOLATION OF SECTION 3616 (a) IF IT BELIEVED HE HAD FILED FALSE INCOME TAX RETURNS WITH INTENT TO EVADE THE TAX

1. IN GENERAL: THE NATURE OF THE ISSUE

The precise area of dispute between the parties in this case is quite narrow. This can be shown by stating, in categorical form, several basic propositions on which the Government and petitioner are agreed:

1. In Section 145 (b) of the Internal Revenue Code of 1939, Congress made it a felony to attempt willfully "in any manner to evade or defeat" the income tax. The filing of a false income tax return in an attempt to evade the tax is an offense under Section 145 (b).

2. In Section 3616 (a) of the same statute, the Internal Revenue Code of 1939, Congress made it a misdemeanor to deliver to a collector any false or fraudulent tax return "with intent to defeat or evade" the assessment. The filing of a false income tax return in an attempt to evade the tax is, therefore, also an offense under Section 3616 (a).

3. Sections 145 (b) and 3616 (a) are both valid and are to be given full force and effect. Neither section impliedly repeals or limits the other.

4. In this case the allegations of the indictment and the Government's proof at the trial are sufficient to support a conviction under either Section 145 (b) or 3616 (a). No question is raised as to the validity of the indictment or the legality of the sentence. Both are sustainable under Section 145 (b).

The sole question presented is whether the trial court erred in refusing to charge the jury, as requested by petitioner, to find him guilty under Section 3616 (a) if it believed that he had filed false income tax returns with intent to evade assessment of the tax (R. 216–217). The requested instruction did not tell the jury that, if it found petitioner guilty of the charge against him, it should choose between a felony conviction under Section 145 (b) or a misdemeanor conviction under Section 3616 (a). Nor did it indicate to the jury upon what basis or standard it should make such a choice. In effect, it directed the jury that, if it found petitioner guilty of the acts charged in the indictment, it should convict him of the "lesser offense" of violating Section 3616 (a).

Petitioner contends that such an instruction was required by Rule 31 (c) of the Federal Rules of Criminal Procedure (*supra*, p. 4), which provides that "The defendant may be found guilty of an offense necessarily included in the offense charged * * *." The Government disagrees. In

our view it was not the jury's function to decide *which* statutory provision was violated by petitioner, but only to determine whether the allegations of the indictment had been proved beyond a reasonable doubt. Whether those allegations, if proved, constituted a violation of Section 145 (b) or Section 3616 (a) was not a question of fact to be submitted to the jury, whose function it was to find the facts, not the law. *Sparf and Hansen* v. *United States,* 156 U. S. 51, 101–103.[a]

To entrust the jury with the responsibility for determining which statute has been violated by a defendant would do more than merely impose an improper function on it. To give such a duty to a petit jury is in effect to allow it to make a judgment as to the range of punishment to be imposed. But it is fundamental that, except where specifically empowered by statute, the jury takes no part in the sentencing process. That is the concern solely of the court. Whether, in view of all the circumstances, the sentence should be mild or severe is for the trial court; it is no more a matter for the jury to pass upon than it is for an appellate court to revise. *Sparf and Hansen* v. *United States,* 156 U. S. 51, 64; *Blockburger* v. *United States,* 284 U. S. 299, 305.

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[a] "In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights." *Sparf and Hansen* v. *United States,* 156 U. S. 51, 106.

2. THE "LESSER INCLUDED OFFENSE" DOCTRINE EMBODIED IN RULE 31 (C) IS INAPPLICABLE TO THIS CASE

The "lesser included offense" doctrine has no proper application to this case. That doctrine is, in essence, that where a defendant is charged with a crime having elements *A*, *B*, and *C*, and the jury finds *A* and *B* but not *C*, it may properly convict the defendant of the "lesser" crime containing only elements *A* and *B*. In such a case the jury exercises its function of finding the facts. It does not decide, as petitioner would have it in this case, the question of law as to which statute the defendant violated.

In this case, the offense charged is precisely the same, and contains exactly the same elements, whether it be laid under Section 145 (b) or 3616 (a). No lesser degree of proof is required for one than the other. Hence, there was no rational basis on which the jury could conclude that the Government had not sustained its burden of proof under Section 145 (b) but had done so under Section 3616 (a). In short, there was no issue of fact, so far as deciding which statute was applicable, for the jury to determine.

As required by Rule 7 (c) of the Federal Rules of Criminal Procedure (*supra*, pp. 3–4), which provides that an indictment shall state the statute which the defendant is alleged to have violated, the indictment here specifically alleged violation of Section 145 (b) (R. 5–7). Rule 7

(c) also provides that "Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." This is a codification of the rule of *Williams* v. *United States,* 168 U. S. 382, 389, which declared that "It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force." Numerous cases have upheld the validity of indictments under statutory provisions other than those under which they were drawn; the citation of an erroneous statute in the indictment will not defeat it if it can be sustained under another statute. See *United States* v. *Hutcheson,* 312 U. S. 219, 229; *United States* v. *Nixon,* 235 U. S. 231, 235–236; *Hammer* v. *United States,* 271 U. S. 620, 625; *Prussian* v. *United States,* 282 U. S. 675, 680; but cf. *United States* v. *Stafoff,* 260 U. S. 477, 481, and *Cole* v. *Arkansas,* 333 U. S. 196, 202. However, we know of no case in which this Court, although sustaining the validity of the indictment under the statute cited therein, nevertheless held that conviction could not be had under that statute because the acts alleged also constituted a violation of some other statute.

Petitioner does not doubt that the "offense charged" in this case, for purposes of applying Rule 31 (c), is violation of Section 145 (b). The

trial court so treated the matter, both in his instructions to the jury (R. 190) and in the formal judgment of conviction (R. 235). Petitioner contends, nevertheless, that Rule 31 (c) made it a question for the jury whether the conviction should be under Section 3616 (a) rather than 145 (b). This contention, we submit, is based on a misconception of the nature and scope of the Rule.

The origin of Rule 31 (c) of the Federal Rules of Criminal Procedure, *supra*, p. 4, is to be found in early English common law. In order for jurors to "well and truly try and true deliverance make between * * * the king and the prisoner," it was "their right to find the prisoner guilty of a lesser charge than that with which he is accused." 3 Holdsworth, *History of English Law* (1923), p. 613. Holdsworth refers, for example, to a grand larceny case in 1367 (Fitzherbert, *Abridgment, Corone* pl. 451 (41 Edw. III)), where the jury brought in a general verdict of guilty together with a special verdict as to a lesser value of the goods stolen, thereby reducing the offense from grand to petty larceny. (*Ibid.*) And see *Salisbury's Case* (1553) Plowden 100, 101, 75 Eng. Rep. 158, 160; *Mackalley's Case*, (1611) 9 Co. Rep. 61b, 77 Eng. Rep. 824; *Respublica* v. *Roberts*, 2 Dall. 124 (Pa.).

In modern law the rule has its application, as Judge Magruder has pointed out, "where the leg-

ences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

SEC. 3651. *Suspension of sentence and probation*

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in

addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed. 145.)

SEC. 3616 PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed. 3616.)

Federal Rules of Criminal Procedure:

RULE 31. VERDICT

* * * * * *

(c) *Conviction of Less Offense.*—The defendant may be found guilty of an offense

necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

RULE 32. SENTENCE AND JUDGMENT

* * * * *

(e) *Probation.* — After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

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